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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

HUMANA INC. AND
HUMANA HEALTH INSURANCE OF NEVADA, INC.,
Petitioners,

v.

MARY FORSYTH, MARIETTA CADE, WILLIE ANDREWS,
MARY LOU BUEHLER, HELEN STAVES,
RANDOLPH BRATTON, AND SEARLE AUTO GLASS, INC.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF ON THE MERITS OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The question presented is whether the application of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. 1961, *et seq.*, to insurance companies would "invalidate, impair or supersede" state statutory[1] insurance law in violation of the McCarran-Ferguson Act.

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1. The McCarran-Ferguson Act protects laws "enacted" by the States. *See* 15 U.S.C. § 1012(b). Only statutory law, not the common law or insurance department regulatory law, is "enacted" within the ordinary meaning of that word.

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STATEMENT OF STANDING

United Policyholders, as *amicus curiae*, has obtained the consent of both the Petitioners and the Respondents to submit this brief. The letters of consent have been lodged with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

United Policyholders is a national, not-for-profit educational organization whose mission is to educate the public, legislators and the courts on insurance issues and consumer rights, and to assist policyholders in securing prompt and fair insurance settlements.[2] The resolution of the issue presented in this case is of great importance to United Policyholders and its members. The RICO statute is an important tool used by policyholders nationwide to combat patterns of fraud in the insurance industry.

SUMMARY OF ARGUMENT

Rather than focus on what test this Court should apply to determine whether RICO impairs state insurance statutes, in particular Nev. Rev. Stat. § 686A.310.2, United Policyholders' Brief addresses whether RICO actually impairs state insurance laws.

Petitioners argue that RICO's remedies are more draconian than those allowed under state law and, for that reason, disrupt a comprehensive state system designed to remedy insurance company fraud. *See* Brief on the Merits of Petitioners at 21-25. Similarly, *amici curiae*, Alliance of American Insurers ("AAI"), American Council of Life Insurance ("ACLI"), Blue Cross and Blue Shield Association ("BCBSA"), Health Insurance Associations of America ("HIAA"), National Association of Independent Insurance ("NAII"), National Association of Mutual Insurance Companies ("NAMI"), and Reinsurance Association of America ("RAA") (collectively, the "Insurance Industry *Amici*") point

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2. No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than United Policyholders and its members made any monetary contribution to the preparation or submission of this brief.

to the "draconian" and inflexible nature of RICO's mandatory treble damage provision. *See* Brief of AAI, ACLI, BCBSA, HIAA, NAII, NAMI and RAA as *Amicus Curiae* in Support of Petitioners at 22-29 ("Insurance Industry *Amici* Brief").

Petitioners and the Insurance Industry *Amici* demonstrate a misunderstanding of the allegedly comprehensive state regulatory schemes upon which they rely. Like most states, Nevada has adopted a version of the Unfair Trade Practices Model Act developed by the National Association of Insurance Commissioners. All state insurance regulatory schemes based on the Unfair Trade Practices Model Act leave intact private remedies under common law or other, non-insurance, statutory law for insurance company unfair trade practices and fraud. These schemes expressly leave intact other state and federal criminal law, like RICO. Indeed, imperiled by this case is the application to insurance companies of every federal criminal statute enacted over the last fifty years.

The insurance industry historically asserted the existence of these other remedies to avoid an expansion of the remedies that insurance commissioners could impose. The insurance industry utilizes the full range of private remedies, including RICO, to address policyholder fraud.

Insurance industry fraud can be national in scope and affect millions of policyholders.[3] Because the state insurance regulatory system was never designed to be the only weapon in the fight against insurance company fraud, the use of RICO is fully consistent with, and does not impair, state unfair trade practices acts.

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3. For instance, the New Jersey Supreme Court held that the insurance industry misled the nation's insurance regulators in securing approval of a standard exclusion contained in standard-form Comprehensive General Liability insurance policies sold to millions of policyholders. *See, Morton Int'l, Inc. v. General Accident Ins. Co.*, 629 A.2d 831, 848-55 (N.J. 1993), *cert. denied sub nom., Ins. Co. of N.Am. v. Morton Int'l, Inc.*, 512 U.S. 1245 (1994). The Court refused to give effect to the industry's judicial interpretation of the exclusion because to do so would require "ignoring the industry's misleading presentation to regulators over twenty years ago, and overlooking the apparent unfairness that such an interpretation would impose on policyholders who were charged rates that did not reflect the radical diminution in coverage contemplated by the insurance industry." *Id.* at 873.

LEGAL ARGUMENT

I. THE REMEDIES IN STATE UNFAIR TRADE PRACTICES ACTS ARE NOT EXCLUSIVE VEHICLES FOR AFFORDING PRIVATE REMEDIES TO POLICYHOLDERS HARMED BY INSURANCE COMPANY FRAUD

The state unfair insurance trade practices acts dealing with insurance fraud, including the Nevada Act at issue herein, are usually derived from the Unfair Trade Practices Model Act (the "Model Act") developed by the National Association of Insurance Commissioners ("NAIC"). *See* Brief of *Amici Curiae* National Association of Insurance Commissioners Supporting Respondent, *Prometheus Funding Corp. v. Merchants Home Delivery Services, Inc.*, No. 95-409 (U.S. filed Sept. 29, 1995) at 2; *Tweet v. Webster*, 614 F. Supp. 1190 (D. Nev. 1985).

A review of the NAIC's adoption of the Model Act reveals that: (1) it was never intended to provide an exclusive vehicle for awarding private remedies for insurance company fraud; (2) at the insurance industry's request, the NAIC rejected a proposal to allow insurance commissioners to order private restitution because the insurance industry insisted that policyholders already had other common law and statutory remedies; (3) the Model Act did not incorporate anti-discrimination provisions because policyholders had remedies under existing non-insurance civil rights laws; and, (4) the Model Act specifically provided that its remedies for insurance company fraud did not replace private remedies available under non-insurance statutes and the common law.

From 1947 to the early 1970's, the Model Act regulated misrepresentation and false advertising of policy contents; false information and advertising with respect to the business of insurance; defamation; boycott, coercion and intimidation; false financial statements, stock operations and advisory board contracts; unfair discrimination in the making of life insurance or accident or health insurance rates; and rebates for life insurance, life annuity, or accident and health insurance policies. *See All-Industry Committee Draft, (January 24, 1947), (final draft) of an Act Relating to Unfair Competition and Unfair and*

Deceptive Acts and Practices in the Business of Insurance, 1960-2 NAIC Proc. 486, 500-510.[4]

In the early 1970s, the NAIC considered fundamental revisions to the Model Act and appointed an insurance Industry Advisory Committee to review the proposed changes. *See, generally*, 1971-2 NAIC Proceedings 341. Many of the Insurance Industry *Amici* appearing in this case were members of the Industry Advisory Committee.

A. The Insurance Industry, Including Many of the Insurance Industry *Amici*, Strenuously Opposed State Insurance Department Involvement In Awarding Private Remedies for Insurance Company Unfair Trade Practices, Including Fraud

One proposed revision to the Model Act considered by the NAIC would have allowed insurance commissioners to award private damages for insurance company unfair trade practices, including fraud. The proposed Section 8(a)(C) provided as follows:

> [T]he (Commissioner) may, at his discretion, order any one or more of the following:
>
> C. Such other relief as is reasonable and appropriate.

See Report of the Industry Advisory Committee to the NAIC B-6 Subcommittee to Review the Model Unfair Trade Practices Act, Nov. 29, 1979, 1972-1 NAIC Proceedings 490, 498.

The Industry Advisory Committee "object[ed] strenuously" to the proposed extension of the commissioners' authority. The Industry Advisory Committee expressed its concern that Section 8(a)(C) "tends to confer the powers of an equity court upon the Commissioner but without the limitations or safeguards that are proscribed for traditional proceedings." It opined that "we do not believe a Commissioner should attempt to fill a role that is usually the province of a jury — that is, ascertain who may have been harmed and to what extent." *Id.* at 510.

4. The NAIC proceedings referenced herein can be found in the "NAIC" file of the "INSURE" library on the LEXIS system.

The insurance industry explained that policyholders already could use other remedies at law to combat unfair trade practices, like insurance company fraud, and that to allow the commissioner to also award such damages would sanction a double recovery. This view was expressed by Robert S. Sieler, Chairman of the Industry Advisory Committee, in his testimony accompanying the Committee's submission of its report to the NAIC:

> In the more serious cases, the public has the very real and effective capability of using remedies at law that now exist. This clause makes prosecutor, judge and jury out of the Commissioner and still would subject the insurer and agent to the public's statutory and common law remedies.

Statement by Robert S. Sieler, Chairman, Industry Advisory Committee, Unfair Trade Practices (B-6), Subcommittee to the NAIC Laws, Legislation and Regulation (B) Committee, 1972-1 NAIC Proceedings 443, 446 (emphasis added).

The Industry Advisory Committee warned the NAIC that it was "very seriously concerned about this matter" and that it could not "endorse the Act with this provision in it." *Id.* Chairman Sieler's remarks were echoed by key insurance industry organizations, including the American Life Convention ("ALC"), the Life Insurance Association of America ("LIAA"), the HIAA, and the National Association of Life Underwriters ("NALU"). These insurance industry representatives complained that "Section 8(a)(C) . . . is an unlimited grant to the Commissioners, administrative officials, of the authority or power usually reserved to courts of equity." Statement by the ALC, LIAA, HIAA, and NALU to the NIC (B), Committee, re: Revised Unfair Trade Practices Act, 1972-1, NAIC Proceedings 443, 447.

Two of the Insurance Industry *Amici*, AAI (known at the time as the American Mutual Insurance Alliance) and NAII, strongly argued against the adoption of Section 8(a)(C) because the authority to award "other relief" was "so all-encompassing as to grant the regulator the power to impose judicial type remedies without the protection of appropriate judicial procedures." Statement to the NAIC (B) Committee

by Mr. Donald McHaugh on behalf of the NAII, AMIA, & State Farm Mutual Insurance Company, 1972-1 NAIC Proceedings 443, 448.

The Industry Advisory Committee and the involved Insurance Industry *Amici* achieved their objective. The insurance commissioners' power to order restitution to policyholders embodied in Section 8(a)(C) was deleted from the Model Act by the Law, Legislation & Regulation (B) Committee. 1972-1 NAIC Proceedings at 490. Thus, due to the insurance industry's strong opposition, the Model Act and the numerous state laws subsequently patterned after it have largely left the award of private damages for insurance company unfair trade practices and fraud to other non-insurance statutory law and common law.

Having successfully convinced the NAIC not to exclusively occupy the area of private remedies for insurance company fraud, it is exceedingly strange that the Insurance Industry *Amici* would represent to this Court that the state insurance codes, particularly the various state unfair insurance trade practices acts, comprehensively regulate the area of private remedies to the exclusion of private rights under other non-insurance statutes or the common law.

B. The Language Of The Model Act Explicitly Preserved The Application Of Other Law To Regulated Activity

Section 9(d) of the Model Act indicates clearly the NAIC's intent that the Model Act would coexist with other non-insurance laws that provide private remedies for insurance company fraud. In arguing that Section 8(a)(C) should not be adopted, the Insurance Advisory Committee stressed that persons injured by unfair trade practices "have an adequate remedy at law." 1972-1 NAIC Proceedings at 509. In advancing this argument, the Industry Advisory Committee specifically pointed to Section 9(d) of the Model Act as "mak-[ing] this very clear." *Id.*

Section 9(d) provides, in its entirety, that:

> (d) No order of the (Commissioner) under this Act or order of a court to enforce the same shall relieve or absolve any person affected by such Order from any liability under any other laws of the State.

Id. at 509.

This language, or substantially similar language, appears in virtually every state insurance code section that deals with insurance unfair trade practices.[5] The language in the Model Acts and the various state codes makes it absolutely clear that the Model Act was not designed to impair other remedies for insurance company unfair trade practices.[6]

C. Due To The Opposition Of The Insurance Industry, The NAIC Rejected A Proposal To Add A Class Action Remedy And A Non-Discrimination Provision To The Model Act

The NAIC considered another provision that would have given state insurance commissioners the power to bring class actions on behalf of consumers for violations of the Model Act. The Industry Advisory Committee strongly recommended against the inclusion of "any provision for consumer class action suits for damages resulting from violation of the Act. . . ." First Report of the Advisory Committee to the NAIC B-5 Subcommittee to Review the Model Unfair Trade Practices Act, June 16, 1971, 1971-2 NAIC Proceedings 341, 350.

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5. *See* Ariz. Rev. Stat. § 20-456.C (1997); Ark. Code Ann. § 23-66-212(d) (1997); Cal. [Ins.] Code § 790.09 (Deering 1997); Conn. Gen. Stat. § 38a-817(d) (1997); Del. Code Ann. tit. 18, § 2308(g) (1997); Del. Code Ann. tit. 18, § 2309(e) (1997); Haw. Rev. Stat. § 431:13-202(b) (1997); Idaho Code § 41-1319(8) (1997); 215 Ill. Comp. Stat. 5/428 (3) (1998); Ind. Code Ann. § 27-4-1-10 (1998); Iowa Code § 507B.8 (1997); Ky. Rev. Stat. Ann. § 304, 12-120(4) (Michie 1996); Mich. Comp. Laws § 500.2049 (1997); Minn. Stat. § 72A.29 (1997); Mich. Stat. Ann. § 24.12049 (1997); Minn. Stat. § 72A.29 Subd. 1 (1997); Miss. Code Ann. § 83-5-43(4) (1997); Mont. Code Ann. § 33-18-1004(4) (1997); Neb. Rev. Stat. § 44-1530 (1997); N.J. Stat. Ann. § 17B:30-17 (1998); N.J. Stat. Ann. § 17:29B-8 (1998); N.M. Stat. Ann. § 59A-16-27.E (1998); N.C. Gen. Stat. § 58-63-35(d) (1997); N.Y. Ins. Law § 2409(b) (Consol. 1997); Okla. Stat. tit. 36, § 1208.D. (1997); Or. Rev. Stat. § 731.252(2) (1997); R.I. Gen. Laws § 27-29-7(d) (1997); Tenn. Code Ann. § 56-8-110(d) (1997); W. Va. Code § 33-11-6(c) (1998); and Wyo. Stat. Ann. § 26-13-115(d) (1997).

6. The relevant savings language appears both in unfair trade practices statutes that have been held to provide for a private right of action and in statutes that have been held not to provide any private right of action.

Among other things, the Industry Advisory Committee told the NAIC that "[t]he common law in all states recognizes the principal of representative actions, so the consumer is not without remedy in this area. . . ." *Id.* The insurance industry argued that reform was unnecessary because the problem was already addressed under relevant non-insurance law. Again, the insurance industry prevailed and the NAIC did not address this area.

The NAIC also considered adding a non-discrimination provision to the Model Act which would affect the "underwriting practices of insurers." The non-discrimination provision "would have restricted the right of insurers to reject persons as risks solely because of race, color, creed, marital status, sex, national origin, residence, age, lawful occupation, failure to place collateral insurance, or previous refusal by another insurer." Remarks of Co-Chairman Durkin, Laws, Legislation & Regulation (B) Committee; Unfair Trade Practices (b)6) Subcommittee, 1972-1 NAIC Proceedings 490, 491.

Among other reasons, the NAIC "decided not to incorporate such provisions because: (1) Some of these matters are presently covered in civil rights laws. . . ." Once again, the NAIC rejected an expansion of the Model Act's protection for policyholders because the insurance industry argued successfully that other remedies were sufficient to protect policyholders. Even though insurance underwriting is an area of intense state insurance regulation, the NAIC clearly intended that federal laws of general application could and would apply to insurance companies, without any resulting impairment of the Model Act or state statutes.

At every turn in the course of the NAIC proceedings, the insurance industry, including several of the Insurance Industry *Amici*, argued that comprehensive administrative remedies for insurance company fraud were unnecessary because private remedies were available under non-insurance statutory and common law. The text of the Model Act, which explicitly preserves policyholders' other remedies, supported these arguments.

Plainly, the Model Act and the state insurance codes are not designed to provide a comprehensive and balanced administrative system providing exclusive remedies for defrauded policyholders. Policyholders are free to utilize non-insurance statutory and common law, including federal law (*e.g.*, the federal civil rights statutes). Accordingly, RICO does not "invalidate, supersede, or impair" state insurance unfair trade practices statutes.[7]

II. THE STATE REGULATORY STRUCTURE DOES NOT EXCLUSIVELY HANDLE THE TASK OF REMEDYING EACH INDIVIDUAL POLICYHOLDER'S DAMAGES CAUSED BY INSURANCE COMPANY FRAUD

As the foregoing reveals, state insurance codes do not authorize insurance departments to award damages to individuals harmed by insurance company unfair trade practices and fraud. State insurance departments often have difficulty addressing even widespread patterns of insurance company fraud, let alone each individual policyholder's complaint of fraud.

In 1996, the Colorado Insurance Department received over 7,000 consumer complaints against insurance companies. The Insurance Department imposed fines in only seven of these cases, one-tenth of one percent. The highest penalty imposed was $20,000.00. Scott J. Paltrow, *Insurance-Industry Lawyer Hired to Audit its Watchdog*, Wall St. J., June 11, 1998, at B2. In response to complaints, the Insurance Division hired a law firm to audit its enforcement activities. The law firm, Sonnenschein Nath & Rosenthal, represented many insurance companies against which complaints had been filed, including: Prudential Insurance Company of America, which

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7. Like the Model Act, RICO was not intended to displace remedies under other laws:

> Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

Pub. L. No. 91-452, § 904(b), 84 Stat. 941, 947 (1970). *See also, Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1130-31 (9th Cir. 1997) ("plaintiff may receive both treble damages under RICO and state law punitive damages for the same course of conduct").

had 33 consumer complaints filed against it, the highest of any life insurance company; Allstate Insurance Company, which had 375 complaints, the third highest for an automobile insurance company; Travelers Group; Aetna; New York Life; and three of the insurance industry's largest trade groups. *See id.*

In New York State, when a policyholder files a complaint in which there are disputed underlying facts, the Insurance Department "generally close[s] these complaints as 'Questions of Fact' and [the Insurance Department] do[es] not count them against an insurer." *See* New York State Insurance Department, *1995 Annual Ranking of Automobile Insurance Companies*, at 4.

The Indiana Insurance Department regulates 1,800 insurance companies with a budget of only slightly over $4 million annually. Sally McCarthy, the Indiana Insurance Commissioner, candidly admits that the Department has been unable to take action even against insurance companies "that repeatedly refuse to pay claims and that mislead customers." Scott J. Paltrow, *A Matter of Policy; How a State Becomes Popular with Insurers — But Not Consumers*, Wall St. J., Jan. 14, 1998, at 1.

Since 1993, the Indiana Insurance Department has received a total of 21,000 complaints. Over the same period, the Department has sent 211 warning letters to 72 companies. Disciplinary action has been taken against eleven companies. In only one of these cases was the action taken in response to consumer complaints. *Id.* The Insurance Department's legal division "almost never takes action," even when the Insurance Department's consumer services division refers files concerning insurance companies it believes to be violating the state's Unfair Claims Practices law. *Id.*

Illustrative of the problem is the experience of fifty policyholders who filed complaints with the Indiana Insurance Department alleging that State Farm Insurance Company was low-balling their claims resulting from a chain of severe thunderstorms which damaged hundreds of thousands of homes on April 19, 1996. "In nearly identical complaints," these policyholders complained that State Farm offered to pay their claims at far less than the actual cost of repairs and "withheld

payments until consumers agreed to settle." *Id.* The Insurance Department sent State Farm fourteen notices that the Insurance Department "believe[s] that your company may have committed violations of the Unfair Claims Settlement Practices Statute." *Id.* The consumer services division asked the legal department to investigate but the legal department has not been able to do much. *Id.* When the legal department receives large numbers of consumer complaints about specific insurance companies, these complaints are referred to outside law firms for evaluation. Since 1991, none of these outside law firms, "often politically well-connected, and some [of which] derive their income from representing insurance companies as well, [has] produced an evaluation that has resulted in disciplinary action against an insurance company." *Id.*

According to the same Wall Street Journal article, state insurance regulators all across the country have "failed to detect widespread sales fraud by several of the nation's biggest life-insurance companies, *despite thousands of consumer complaints*." *Id.* (emphasis supplied).

State regulators took disciplinary action only after policyholders filed lawsuits and the press reported the abuses. *Id.* While the Wall Street Journal recognizes this as a failure of the state insurance regulatory system, the Insurance Industry *Amici* herald this series of events as an unqualified success. *See* Insurance Industry *Amici* Brief at 20-21.[8]

These statistics confirm why the insurance industry craves that insurance company fraud be addressed solely under state administrative procedures — little or nothing is likely to happen.

III. THE POWERFUL REMEDIES AVAILABLE UNDER RICO DO NOT IMPAIR STATE INSURANCE REGULATORY SCHEMES

The state insurance codes that RICO allegedly impairs do not provide for exclusive remedies for policyholders injured by insurance company unfair trade practices and fraud. They are merely one part of a system for addressing this important national problem.

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8. The attempts to give insurance regulators credit for initiating settlements to benefit Holocaust victims and the Prudential policyholders are misplaced. These matters were well underway before the insurance regulators first became involved.

A. The Structure Of The Model Act Indicates That It Is Primarily Designed To Protect The Public Against Insurance Company Charlatans.

Under Section 7 of the Model Act, an insurance commissioner initiates administrative action against a person that is engaged in any unfair method of competition or any unfair or deceptive act or practice. *Cf. United States v. Blumeyer*, 114 F.3d 758, 768 (8th Cir. 1997) ("our particular concern in *Doe* — that wronged policyholders would turn to RICO suits instead of pursuing administrative channels of relief, *see id.* at 1306-07 — is simply inapplicable here").

The commissioner serves a statement of charges on the insurance company and sets a hearing date. The insurance company then has an opportunity to show cause why an order requiring it to cease and desist from the unfair trade practice should not be entered. While no formal rules of pleading or evidence are required, the commissioner may administer oaths, examine and cross-examine witnesses, and receive oral and documentary evidence.

If the commissioner finds that the insurance company committed an unfair trade practice, then the commissioner may take action pursuant to Section 8 of the Model Act. The commissioner's action may include ordering the insurance company to cease and desist the unfair trade practice and to pay relatively minor monetary penalties. In addition, the commissioner may suspend or revoke the insurance company's license, if the violation was knowing. The commissioner may impose additional penalties if an errant insurance company violates a cease and desist order.

Absent from this administrative process is any right of an injured victim of insurance company fraud to initiate a proceeding, to participate in the hearing, or, most importantly, to recover any remedy. The victim may, like anyone else, intervene upon a showing of good cause. Model Act, Sec. 7(b). If the commissioner does not find an unfair trade practice, then an intervenor may appeal to a judicial forum. Model Act, Section 10.

The state administrative process is simply not designed to be the sole process to address insurance company unfair trade

practices and insurance company fraud. RICO civil damages do not impair the state insurance regulatory schemes, but supplement and support those systems. This should come as no surprise to the insurance industry. The insurance industry, including many of the Insurance Industry *Amici*, represented consistently to the NAIC that policyholders had substantial private remedies, including federal remedies, outside of the Insurance Department.

B. RICO Actually Assists State Insurance Departments To Combat Insurance Company Fraud

Contrary to the erroneous assumptions of the Petitioners, RICO actually assists, and does not impair, the states in their battles against insurance company fraud. Civil RICO is "designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorneys' fees." *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 149-50 (1987); *see also, Shearson/Amer. Express, Inc. v. McMahon*, 482 U.S. 220, 240-41 (1987) (civil RICO treble-damages provisions are primarily remedial in purpose).

In a brief filed with this Court in 1995, the NAIC flatly contradicted the idea, urged by Petitioners here, that RICO impairs the enforcement of state insurance law:

> The National Association of Insurance Commissioners ("NAIC"), whose members are the principal state insurance regulators, strenuously disagrees with the notion that RICO impairs any state's insurance laws. The NAIC urges, to the contrary, that RICO enhances the effective enforcement of those laws.

Brief of *Amicus Curiae* National Association of Insurance Commissioners Supporting Respondent, *Prometheus Funding Corp. v. Merchants Home Delivery Serv., Inc.*, No. 95-409. Indeed, insurance commissioners routinely use RICO.[9]

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9. *See Kempe v. Monitor Intermediaries, Inc.*, 785 F.2d 1443 (9th Cir. 1986); *Schnact v. Brown*, 711 F.2d 1343 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983); *Kaiser v. Stewart*, Civil Action No. 96-6643, 1997 U.S. Dist. LEXIS 12788 (E.D. Pa. Aug. 19, 1997); *Clark v. Millam*, 847 F. Supp. 409 (S.D. W.Va. 1994); *State of North Carolina v. Alexander & Alexander Servs., Inc.*, 680 F. Supp. 746 (E.D. N.C. 1988).

A recent case from the Eastern District of Pennsylvania is illustrative. *See Kaiser v. Stewart*, Civil Action No. 96-6643, 1997 U.S. Dist. LEXIS 12788 (E.D. Pa. Aug. 19, 1997). The Insurance Commissioner of Pennsylvania brought a civil RICO action on behalf of an insolvent insurance company. The Commissioner alleged that the defendants had taken control of the insurance company, had siphoned off assets of the company, rendering it insolvent, and then had disguised that insolvency through a pattern of fraud.

The defendants in *Kaiser* argued that the McCarran-Ferguson Act barred the RICO claims. *Kaiser*, 1997 U.S. Dist. LEXIS 12788, at * 37. The district court rejected that argument, finding RICO to be consistent with the Pennsylvania insurance laws, regardless of the difference in remedies. *Id.*, at * 42-44. The court came to a similar conclusion in a parallel criminal RICO action, finding that the federal interest in protecting the public from racketeering is perfectly compatible with Pennsylvania's interest in protecting policyholders. *United States v. Stewart*, 955 F. Supp. 385 (E.D. Pa. 1997).

C. State Systems Allow Policyholders to Pursue Other Remedies, In Addition To Their Remedies Under State Unfair Trade Practices Acts

The Model Act and the state systems patterned after it allow policyholders to pursue private causes of action outside of the administrative procedure provided by the Model Act. The state unfair trade practices acts co-exist with other remedies under state common law, state non-insurance statutory law, and federal RICO.

1. The Nevada Scheme

The Nevada Unfair Trade Practices Act, particularly Nev. Rev. Stat. § 686A.310, which addresses unfair insurance trade practices, is not the exclusive remedy for policyholder damages caused by insurance company fraud. Section 686A.310 was patterned after the NAIC Model Act. *Hart v. Prudential Prop. & Cas. Ins. Co.*, 848 F. Supp. 900, 903 (D. Nev. 1994). It was added to the Nevada statutes in 1975 and sets forth twelve

specific activities that are deemed unfair trade practices. *See Tweet v. Webster*, 614 F. Supp. 1190, 1191 (D. Nev. 1985). The district court in *Tweet* held that Nev. Rev. Stat. § 686A.310 did not create a private cause of action for an injured third-party claimant. *Id.* at 1195.[10]

In response to *Tweet*, in 1987 the Nevada legislature amended § 686A.310 to eliminate the "frequency" or "general business practice" requirement and to provide specifically for a private cause of action:

> In addition to any rights or remedies available to the commissioner, an insurer is liable to the insured for any damages sustained by the insured as a result of the commission of any act set forth in subsection 1 as an unfair practice.

Nev. Rev. Stat. § 686A.310(2). This provision allows a policyholder to bring a judicial action to achieve redress for any activity proscribed in Nev.Rev.Stat. § 686A.310.

Moreover, Nevada common law provides a cause of action for an insurance company's tortious breach of the implied covenant of good fair and dealing. *See United States Fidelity & Guar. Co. v. Peterson*, 540 P.2d 1070, 1071 (Nev. 1975). A policyholder can obtain punitive damages for injuries caused by an insurance company's breach of the duty of good faith and fair dealing where the insurance company acted oppressively or where the insurance company has engaged in wilful and intentional conduct in reckless disregard of its possible consequences. *Ainsworth v. Combined Ins. Co. of Am.*, 763 P.2d 673 (Nev. 1988). Under Nev. Rev. Stat. § 42.010, a non-insurance statute of general application, a jury may award punitive damages where the defendant has been guilty of fraud, malice, or oppression. *Id.*, 763 P.2d at 675.

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10. One federal court subsequently held that the original version of Nev. Rev. Stat. § 686A.310 implied a private right of action by a first-party claimant, *i.e.* by the policyholder. *Crystal Bay Gen. Imp. Dist. v. Aetna Cas. & Sur. Co.*, 713 F. Supp. 1371, 1376-77 (D. Nev. 1989). *Amicus curiae* believes that this is the right result and that all state statutes based upon the Model Act provide for a private right of action in addition to preserving all non-insurance statutory and common law rights.

The insurance industry has argued that the treble damages imposed by RICO are more draconian than the Nevada statutory scheme and, therefore, somehow impair it. Common law punitive damages, however, can extend well beyond RICO's award of treble damages. In *Ainsworth*, the Nevada Supreme Court approved an award of $5,939,500 in punitive damages against an insurance company where the jury had found that the policyholders were entitled to $9,600 in benefits under the insurance policies, as well as an additional $200,000 in compensatory damages. RICO treble damages in *Ainsworth* would have amounted to a small fraction of the almost $6 million punitive damages awarded under state common law.

In addition, under Nevada's unfair trade practices act, the Insurance Commissioner can revoke or suspend an insurance company's license to do business, a remedy far more draconian than the imposition of treble damages.

2. The Illinois Scheme

Like Nevada, Illinois has adopted a state unfair trade practices act patterned upon the Model Act. Unfortunately, the courts in Illinois have held that there is no private right of action under the Illinois regulatory scheme. *See Anderson v. Humana, Inc.*, 820 F. Supp. 368, 373 (N.D. Ill. 1993), *aff'd*, 24 F.3d 889 (7th Cir. 1994). As is universally true in other states, however, the Illinois insurance regulatory scheme was never designed to occupy the field of private redress of insurance company fraud. Private remedies are not limited by the Illinois insurance regulatory scheme. *See Crystal Bay Gen. Imp. Dist. v. Aetna Cas. & Sur. Co.*, 713 F. Supp. 1371 (D. Nev. 1989). For instance, policyholders victimized by insurance company fraud may seek redress either under common law fraud doctrines or under non-insurance statutes such as the Illinois Consumer Fraud Act. *See Pinski v. Adelman*, No. 94 C 5783, 1995 U.S. Dist. LEXIS 16550, at * 20 (N.D. Ill. Nov. 2, 1995); *P.I.A. Michigan City, Inc. v. National Porges Radiator Corp.*, 789 F. Supp. 1421, 1426 (N.D. Ill. 1992). Policyholders bringing fraud actions in Illinois may be entitled to punitive damages and attorney's fees. *Gent v. Collinsville Volkswagen, Inc.*, 451 N.E.2d 1385, 1390-91 (Ill. App. Ct. 1983).

Common law and non-insurance statutory rights co-exist with the regulatory scheme. The fact that RICO provides for treble damages, 18 U.S.C.A. § 1964(c), no more impairs the insurance regulatory scheme than does the existence of common law fraud, punitive damages, or other non-insurance statutory causes of action available to the policyholder. *See NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992), *cert denied*, 508 U.S. 907 (1993); *Pinski*, 1995 U.S. Dist. LEXIS 16550, at * 20.

3. The Pennsylvania Scheme

The Third Circuit recently explained RICO's relationship with Pennsylvania statutory and common law. *See Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185, 192-95 (3d Cir. 1998). The court noted that, even though the insurance commissioner alone was empowered to enforce the Unfair Insurance Practices Act ("UIPA"), Pennsylvania courts had not barred common law suits for fraud and deceit arising out of insurance practices and had sanctioned policyholders' use of Pennsylvania's consumer protection statute to recover for insurance company fraud. *Id.* at 192. The Third Circuit found "no indication . . . that Pennsylvania's non-recognition of a private remedy under the UIPA represents a reasoned state policy of exclusive administrative enforcement or that the vindication of UIPA norms should be limited or rare." *Id.* at 195. Allowing the RICO action, the court ruled, would not "invalidate, impair or supersede" Pennsylvania's scheme of insurance regulation. *Id.*

D. RICO Criminal Remedies Are An Important Part Of The Web Of Laws Designed To Eradicate Insurance Company Fraud

The insurance industry is not immune from federal criminal statutes. If this Court decides that the McCarran-Ferguson Act precludes the application of civil RICO to insurance companies, it will jeopardize prosecutions under every federal criminal law enacted in the last fifty years.

On the contrary, a holding by this Court that civil RICO applies to the insurance industry will avoid the contortions

necessary to permit the continued enforcement of federal criminal laws. *See, e.g., United States v. Blumeyer*, 114 F.3d 758, 768 (8th Cir. 1997) (distinguishing criminal RICO from civil RICO on the basis that policyholders do not initiate administrative criminal action, ignoring the fact that policyholders do not initiate action under the unfair trade practices acts).

Some of the Insurance Industry *Amici* argue that the enactment of 18 U.S.C. § 1033, imposing criminal penalties for certain types of fraud committed by persons "engaged in the business of insurance," signals that Congress intended or understood that RICO would not apply to insurance companies.[11] If this dubious proposition were true, it would mean that the McCarran-Ferguson Act would exempt insurance companies and all persons engaged in the business of insurance from any liability under any general federal criminal statute passed since the 1945 enactment of the McCarran-Ferguson Act.

Thankfully, the proposition is not true. Section 1034(a), which imposes civil penalties for violations of Section 1033, provides that "[t]he imposition of a civil penalty under this subsection does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is available by law to the United States or any other person." *See* 18 U.S.C. § 1034(a). Clearly, Congress understood that persons committing fraud while engaged in the business insurance could be held liable under other federal criminal and civil laws. RICO is just such a law.

IV. THE INSURANCE INDUSTRY CONSISTENTLY USES FEDERAL LAW AGAINST POLICYHOLDERS BUT DENOUNCES ITS USE TO REMEDY INSURANCE COMPANY FRAUD

A. The Insurance Industry Uses RICO Against Policyholders

The insurance industry's position on the application of federal law, particularly RICO, to the business of insurance

11. *See* Brief of Alliance of American Insurers, American Council of Life Insurance, Blue Cross and Blue Shield Association, Health Insurance Association of America, National Association of Independent Insurers, National Association of Mutual Insurance Companies and Reinsurance Association of America as *Amici Curiae* in Support of Petitioners, at 12 n.4.

swings like a weather vane in a tornado. The best illustration of the insurance industry's fleeting concern for principles of federalism is found in the insurance industry's own widespread use of RICO. When insurance companies claim to be victims of insurance fraud, they look to RICO for a remedy.

Aetna Casualty & Surety Company brought several actions against five automobile body shops and two insurance claim adjusters alleging that the parties engaged in a scheme to obtain payments under fraudulent insurance claims in violation of RICO. *See Aetna Cas. & Sur. Co. v. P&B Auto Body*, 43 F.3d 1546, 1551 (1st Cir. 1994). Aetna alleged that the parties committed predicate acts of mail fraud. *Id.* at 1560. Aetna brought the RICO causes of action at the same time it asserted that the defendants were liable to it under the Massachusetts Unfair Trade Practices Act, Mass. Gen. Laws ch. 93a, which allows for a private right of action, including the imposition of treble damages. *See id.* at 1566.

Insurance companies have brought many other RICO actions. *See, Preferred Mutual Ins. Co. v. Dumas*, Nos. 89-3394, 89-3446, 1991 U.S. App. LEXIS 21288 (6th Cir. 1991) (insurance companies brought a civil RICO action, as well as common law fraud actions, against a policyholder for the submission of fraudulent insurance claims); *State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4 (9th Cir. 1987) (insurance companies sought RICO treble damages for the submission of false claims); *Vanliner Ins. Co. v. All Risk Serv., Ltd.*, 990 F. Supp. 1145, 1146-47 (E.D. Mo. 1997) (insurance company sought damages for, among other things, fraudulent inducement, negligent misrepresentation, breach of contract, breach of fiduciary duty, conversion, and violations of RICO relating to the issuance of certain insurance policies); *Nationwide Mut. Ins. Co. v. Perez*, No. 97-2172 (J.P.), 1997 U.S. Dist. LEXIS 13744 (D. P.R. 1997) (insurance company brought RICO action based on alleged insurance scam involving previously wrecked cars); *Soanes v. Empire Blue Cross/Blue Shield*, 970 F. Supp. 230, 239-241 (S.D. N.Y. 1997) (insurance company prevails in RICO claim in which defendants made representations to obtain low-cost insurance coverage for members); *Blue Cross of California v. SmithKline Beecham*, No. 397CV01795

AVC (D. Conn. filed Aug. 19, 1997) (thirty-five major health insurance companies charged SmithKline with RICO violations involving the alleged use of improper billing and kickbacks);[12] *Soanes v. Empire Blue Cross/Blue Shield*, 970 F. Supp. 230 (S.D. N.Y. 1997) (health insurance company brought RICO claims against administrators of various labor unions' health insurance programs); *Chubb & Son, Inc. v. Wigand*, N.Y.L.J., Jan. 23, 1998, at 26 (N.Y. Sup. Ct.) (insurance companies charged an insurance adjuster with violations of RICO for allegedly devising schemes to inflate insurance claims).

The insurance industry has also sought to benefit from pro-RICO decisions such as *Merchants Home Delivery Service, Inc. v. Reliance Group Holdings, Inc.*, 50 F.3d 1486 (9th Cir.), *cert. denied*, 516 U.S. 964 (1995) ("*Merchants Home*"). For instance, Zenith Insurance Company filed an action in federal district court alleging that the defendants had caused the filing of bogus insurance claims and had submitted fraudulently inflated bills for medical and other services in conjunction with those claims. *See Zenith Ins. Co. v. Eisenberg*, Nos. 94-55893, 95-56188, 94-56138, 1996 U.S. App. LEXIS 26815, at *6 (9th Cir. Oct. 11, 1996). Zenith Insurance Company brought both state law claims and federal RICO claims. *Id.* The district court dismissed Zenith's RICO claims under the McCarran-Ferguson Act. *Id.*

Zenith appealed and the 9th Circuit reversed and reinstated Zenith's RICO claims. *Id.* at *6-8. The Ninth Circuit held that the fraudulent practices of which Zenith complained were "prohibited both under California [state acts] and under the federal RICO statute." *Id.* at *8. The Ninth Circuit reasoned that "there is no principled basis for distinguishing, for McCarran-Ferguson Act purposes, between the alleged insurance [company] fraud in [*Merchants Home*] and the alleged insurance fraud in [*Zenith*]." *Id.*

12. The insurance companies in that case contended that they collectively represented "almost [forty percent] of America's private insurance industry." *See Health Insurers Sue SmithKline's Lab Division*, Ins. Coverage Litig. Rptr., Sept. 5, 1997, at 254; *see also, Insurers Sue Over Lab Billing*, Bus. Ins., Aug. 25, 1997, at 2.

One commentator has noted that insurance commissioners would go apoplectic if they suddenly found that they no longer could use RICO to prosecute allegations of insurance fraud. Christopher Winans, *Insurer's Weapon Against RICO Claims Could Backfire If It's Too Successful*, Best's Ins. Mgmt. Rep., June 14, 1993, at 4. One suspects that the insurance industry would be similarly apoplectic if it discovered that it could not longer use RICO or other federal statutes to combat insurance fraud when the insurance company is the victim and not, as here, the perpetrator.[13]

B. The Insurance Industry Uses Other Federal Laws Against Policyholders

Despite the picture portrayed in the various insurance industry briefs herein, the insurance industry is a "fair weather friend" of federalism. The insurance industry urges the application of federal statutes to the business of insurance whenever such application can enhance insurance company profits. One need look no further than the insurance industry's consistent use of the federal Employment Retirement Income Security Act, 29 U.S.C. 1001, *et seq.*, to trump otherwise troublesome state laws.

Insurance Industry *Amicus* ACLI is the largest life insurance trade association, and Insurance Industry *Amicus* HIAA purports to represent hundreds of companies that sell over eighty-five percent of America's health insurance. Brief of *Amici Curiae* for ACLI and HIAA in Support of the Petition,

13. The world has not, and will not, come to an end if the insurance industry is held subject to RICO. In *Barnett Bank v. Nelson*, the insurance industry argued to this Court that "the sky will come falling down," "eradicate the well-established state regulation" and undermine the regulatory scheme if the Supreme Court ruled that the McCarran-Ferguson Act did not preempt applicable federal law. *See* Petitioner's Reply Brief at Point II, *Barnett Bank v. Nelson*, 517 U.S. 25 (1996) (No. 94-1837) *quoting amici* briefs. The Court was not impressed with this parade of horribles. This Court held that the McCarran-Ferguson Act did not preempt the application of federal law. *Barnett Bank v. Nelson*, 517 U.S. 25 (1996). *See also, NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993) (insurance company unsuccessfully demanded exemption from the prohibition against redlining in the Federal Fair Housing Act).

Pilot Life Ins. Co. v. Dedeaux, No. 85-1043, Oct. Term, 1985 (dated Dec. 20, 1985) at 1 ("Pilot Life Brief"). In *Pilot Life*, ACLI and HIAA took a forceful anti-federalism position before this Court, arguing against the application of state common laws and in favor of the sole application of the federal ERISA statute. The ACLI and the HIAA wrote that "[t]he adjudication of benefit claims based upon diverse state common laws will inevitably result in the haphazard imposition of liability . . . ; . . . liability for compensatory and punitive damages is unpredictable under state common laws which permits such awards." *Id.*

Similarly, several years ago HIAA and ACLI joined a number of major insurance companies in arguing to this Court that, under ERISA, "state insurance regulations are not saved from preemption. . . ." Brief for Respondents The Travelers Ins. Co., et al., *New York State Conference of Blue Cross & Blue Shield Plans v. The Travelers Ins. Co.*, Nos. 93-1408, 93-1414 and 93- 415, 1993 U.S. Briefs 1408, Oct. Term, 1994 (dated Dec. 13, 1994).

Other examples of insurance industry attacks on federalism abound. A recent AIA press release began with the following observation:

> Fifty state regulatory systems can be redundant and costly for the nation's property and casualty insurers, particularly at the time when competition is intense and companies are slashing business costs.

AIA, *AIA Continues Assault on Regulatory Red Tape* at 1 (June 16, 1998).[14] One of the AIA's goals is to free commercial insurance from price regulation by state insurance regulators. *Id.*

The insurance industry regularly champions federal legislation that protects it from having to pay claims arising out of state-based consumer litigation. On August 13, 1998, the AIA championed federal legislation relieving companies with Year 2000 liability from some lawsuits. *See* AIA, *News* (Aug. 13, 1998).[15] Applauding the legislation, the AIA opined that Congress needed to do more to limit liability. *Id.*

14. This document is publicly available on the Internet at www.aiadc.org/press/061698.html.

The AIA recently supported federal legislation in the area of highway safety, stressing the financial impact of motor vehicle accidents upon "auto insurance consumers." AIA, *Insurers Urge President to Sign Highway Funding Measure* (June 3, 1998).[16] A number of years ago, State Farm Insurance Company and a group of insurance companies successfully forced the United States Department of Transportation to impose mandatory automatic restraint standards upon the automobile industry. Insurance Information Institute, III *Insurance Issues Update* (Sept. 1998) at 7.[17]

Within the past month, Insurance Industry *Amicus* HIAA applauded the involvement of the federal Health Care Financing Administration ("HCFA") in helping insurance companies to combat insurance fraud and abuse. HIAA termed insurance fraud a "very important national issue." Statement of Chip Kahn, CEO and President-Designee, HIAA at 1.[18] An HIAA publication noted that the HIAA "offers representation before Congress and other bodies to influence federal legislation and regulation" and drafts federal "legislation, amendments, floor statements, and testimony." HIAA, *About HIAA* at 1.[19]

The HIAA similarly lauded the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"):

> Federal laws affecting health care and the health insurance marketplace ensure a certain degree of regulatory uniformity for consumers, particularly multi-state employers. HIAA believes that responsible federal

15. This document is publicly available on the Internet at www.aiadc.org/press/081398.htm.

16. This document is publicly available on the Internet at www.aiadc.org/press/060398.html.

17. This document is available on LEXIS.

18. This document is publicly available on the Internet at www.hiaa.org/newsroom/press-releases/release2.html.

19. This document is publicly available on the Internet at www.hiaa.org/abouthiaa/purpose.html.

reform can assure a stable, affordable, and responsive health care system that lasts well into the next century.

HIAA, *Federal Perspectives* (July 31, 1997) at 1.[20]

The HIAA also called for federal involvement in controlling health care litigation: "HIAA supports federal legislation that would impose limits on punitive damage awards and on joint and several liability for non-economic damages. *Id.* at 4. "HIAA also supports federal legislation to limit extra-contractual and punitive damages both for health care claims disputes and for malpractice and other medical liability awards." *Id.* The HIAA even championed federal insurance consumer protection standards in HIPAA, noting "nothing in the new law prevents states from imposing more stringent consumer standards." *Id.* at 7. Apparently, HIAA would not take the position that those more stringent state standards would impair the federal standards.

In a statement to Congress, the Reinsurance Association of America ("RAA") noted that "federal involvement is a necessary component" to address the issue of "natural catastrophe exposure and insurance." Statement of Franklin W. Nutter, Pres., RAA Before the U.S. House of Representatives Committee on Banking and Financial Services (Apr. 23, 1998) at 1.[21] The RAA stressed that "[t]he reinsurance industry has maintained a consistent position on the need for high-level federal involvement in excess private market capacity." *Id.* at 1. The RAA further testified that "[s]tate catastrophe funds should only be employed as a last resort." *Id.* Indeed, the RAA criticized one bill, H.R. 219, because it "**will encourage the greater intrusion of state government into the private insurance market ....**" *Id.* at 6 (emphasis in original). Insurance Industry *Amicus* NAII also strongly supported federal disaster relief legislation. "NAII Member Urges Congress to Strengthen Disaster Bill," PR Newswire Assoc., Inc. (Apr. 23, 1998) at 1.[22]

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20. This document is publicly available on the Internet at www.hiaa.org/consumerinfo/fedpers2.html.

21. This document is publicly available on the Internet at www.raanet.org/policy/testimony/fwntestimony_42398.html.

22. This document is publicly available on LEXIS.

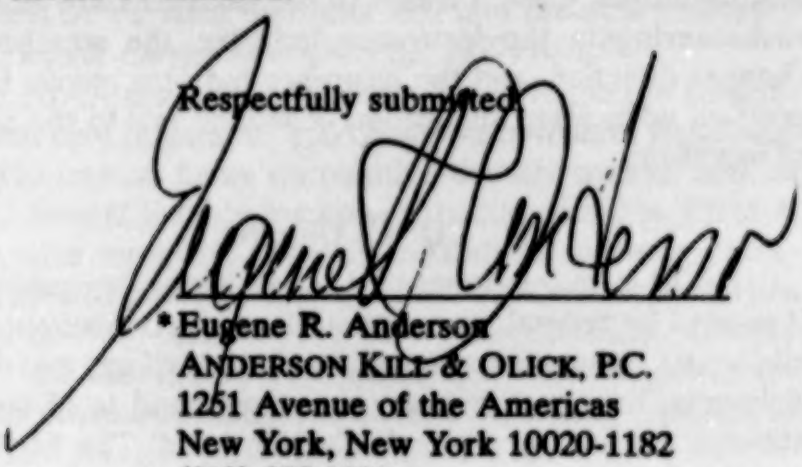
Although the insurance industry has supported these federal initiatives, when it comes to federal legislation combating racketeering in the insurance industry, the weather vane changes direction, and the insurance industry recoils from its position advocating application of federal law to the business of insurance.

CONCLUSION

RICO is an important tool in combating insurance fraud. It is used by federal prosecutors, the nation's insurance commissioners, insurance companies, policyholders, and injured claimants. Insurance industry company fraud is of no lesser national concern than is policyholder fraud. The Model Act and the various state insurance codes do not comprehensively or exclusively attempt to regulate private remedies for policyholders. Instead, the Model Act and the insurance codes expressly provide that, in addition to any regulatory remedies or penalties, insurance companies will remain liable under any other applicable non-insurance statute or common law. In large part, this feature of the state insurance regulatory system is a direct result of the insurance industry's strenous efforts to avoid having the nation's insurance commissioners exercise comprehensive control, let alone exclusive control, over private remedies for insurance company fraud. For these reasons, RICO does not "invalidate, impair or supersede" the Nevada Insurance Code or other state insurance codes.

For the reasons set forth herein, the Court of Appeals' opinion should be affirmed.

Respectfully submitted,



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Dated